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No. 88-1029

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

YONKERS RACING CORPORATION,
Petitioner,

v.

THE CITY OF YONKERS,
Respondent,

and

UNITED STATES OF AMERICA and YONKERS BRANCH NAACP, *et al.*,
Intervenor-Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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REPLY BRIEF FOR PETITIONER

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On pages 6-7 the United States refers to the record before the Court of Appeals and purports to cite from the government's motion papers which sought to compel the City to remove the Article 78 proceeding. Contrary to the government's representation, the request was for more than an order compelling removal "under the All Writs Act." The document cited stated that "The United

States of America, plaintiff herein, hereby moves this Court, pursuant to 28 U.S.C. § 1651, to issue an order to show cause why the City of Yonkers should not be required to file a petition with this Court, *pursuant to 28 U.S.C. § 1441(a)*, seeking (removal) . . ." (emphasis added).

The All Writs Act was simply the vehicle for the government's request for an order that the City be directed to *remove pursuant to the removal statute.* There was never any claim that the All Writs Act provided authority for removal absent the controlling statutes. The Court of Appeals indicated that removal was so doubtful under those statutes that an independent basis for removal was required thereby creating an enormous, unprecedented increase in the jurisdiction of the federal courts. The decision of the Court of Appeals clearly holds that removal can be based entirely upon the All Writs Act in a situation where it is precluded by the applicable removal statutes.

This misreading of *Pennsylvania Bureau of Correction* by the Court of Appeals is illustrated by the arguments the United States seeks to support by that opinion. The "exceptional circumstances" envisioned in *Pennsylvania Bureau of Correction* to justify the use of the All Writs Act were logistical not legal. This Court clearly did not want to preclude the possibility of directing the United States Marshalls to transport a state prisoner to federal court when the state custodian would or should not do so. The United States' argument that "exceptional circumstances" are present under *Pennsylvania Bureau of Correction* anytime a statute forbids an act which is sought to be performed is simply an effort to avoid addressing the inescapable result of the absence of federal subject matter jurisdiction. As discussed, *infra*, there is nothing exceptional in a situation where a litigant invokes the protections of applicable law under the circumstances presented by the facts of this case.

Contrary to the claim of the United States on page 15, the Raceway has always argued that removal could not be compelled. There is no legal basis for such an order. Furthermore, a remedy exists to enjoin a state court direct challenge to a federal court order under the Anti-Injunction Act. As discussed on page 14 of the Raceway's Petition, the failure to seek relief under such statute is indicative of a recognition that the Raceway is acting entirely within its rights.

The brief of the United States is based upon the premise that by seeking the implementation of the law of the forum which the Consent Decree designated for the condemnation proceeding, the Raceway is attacking the Consent Decree itself and thus providing a basis for the exercise of federal jurisdiction. This argument has no merit. As the United States admits on page 4, the Consent Decree obligated the City to "initiate" an eminent domain proceeding to seek to acquire the property of the Raceway. Consistent with the obvious requirements of due process, the Consent Decree did not condemn the property of the Raceway. The Raceway has never sought to challenge the designation of its site in the Consent Decree. The defenses raised in the Answer to the condemnation petition, repeated in the Article 78 proceeding, are all based upon the failure of the City to follow the state law procedures required by the Consent Decree in the proceeding it was directed to and did initiate.[1]

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[1] The argument of the United States that a federal court condemnation would have been provided for in the Consent Decree had it been envisioned that a condemnee would rely upon the provisions of state law cannot be seriously advanced. The determination that private sites would be sought carried with it legal consequences which the government cannot disregard. Contrary to the contention of the Yonkers NAACP on page 9 of its brief, the City could not have commenced the condemnation proceeding in the district court. In the absence of diversity the federal courts have no jurisdiction in such matters except where the United States is the condemnor (Wright & Miller, *Federal Practice & Procedure* § 3055).

Nothing which the Raceway has done provides a basis for the removal of the Article 78 proceeding. Unlike *Local Loan Co.* and *Supreme Tribe of Ben Hur*, cited by the United States on page 14, the Raceway had not initiated any proceeding seeking to overturn a federal court order. The relief sought in the Article 78 proceeding to which the government repeatedly refers, does not challenge the selection of the Raceway site and can only be properly understood in the context of the failure of the City to follow the requirements of New York's Eminent Domain Procedure Law in a condemnation proceeding.

The United States' claim on page 13, that the Raceway opposed the designation of its property is not supported by the reference to an affidavit in the Court of Appeals record which emphasized the importance of addressing the environmental issues which the Raceway contends render the site unsuitable for housing & thus for condemnation. See page 48a of the Court of Appeals joint appendix referred to on several occasions in the government's brief. Contrary to the contention of the government on page 13, the Consent Decree did not determine the suitability of the Raceway site. That was a matter to be considered in the eminent domain proceeding.

As the District Court has recognized in its actions with regard to the replacement site for St. Joseph's Seminary, discussed on page 15 of the government's brief, the power is inherent in the Court to direct modifications consistent with the purpose of a Consent Decree. Thus an ultimate finding that the Raceway site was unsuitable and could not be condemned would have no effect on the integrity of the Consent Decree. See e.g., *Chance v. The Board of Examiners*, 561 F.2d 1079, 1086 (2nd Cir., 1977). Such a determination would not be inconsistent with the Consent Decree and would simply require the designation of a replacement site by the District Court.

As a non party to the civil rights action, the Raceway has never been privy to environmental reviews assumed

by the Court of Appeals to have been performed. The references on page 4 of the government's brief to such studies are to the opinions of the courts below not to any such document.

As the Court of Appeals observed, the Article 78 proceeding was a redundancy required by the uncertainties of state law and did not change the status of the Raceway to that of a plaintiff in a condemnation (11a-14a). This reality is completely ignored by the government in its arguments that the actions of the Raceway must be equated with those of a person voluntarily interjecting himself into a controversy to achieve affirmative relief. At pages 16-17 the government expressly acknowledges the validity of the cases decided by this Court, relied upon by the Raceway for the proposition that the status of the parties for removal purposes is unaffected by state law requirements that a condemnee sue to protect its rights. The government's attempt to distinguish the present situation highlights the difficulty of its position since in cases such as *Mason City and Fort Dodge R.R.*, the condemnee, like the Raceway, commenced a proceeding pursuant to state law. In that case this Court held that such actions did not provide a basis for removal by the condemnor.

The United States argues that ancillary jurisdiction exists over the Article 78 proceeding. This is the first time this doctrine has been raised by any party. It is completely inapplicable. The cases cited at page 14 of the government's brief involved situations where jurisdiction necessarily existed over all claimants to a fund despite the absence of diversity (*Freeman v. Howe*) or over parties represented in an earlier action who later sought to challenge the result in a non diversity situation (*Supreme Tribe of Ben Hur v. Cauble*). *Local Loan Co. v. Hunt* determined that jurisdiction existed to prevent a state court challenge to a discharge in bankruptcy

by a creditor in that proceeding. See generally Wright & Miller, *Federal Practice & Procedure*, § 3523.

In *Owen Equipment & Erection Co. v. Kroger*, it was held that an independent state law claim could not be asserted by a plaintiff against a third-party defendant in the absence of diversity between those parties, a result which gives no support to the position of the United States in this matter. The government's reliance on the foregoing authority is misplaced.

The doctrine of ancillary jurisdiction has never been extended to a non-party, non-claimant, such as the Raceway. See, e.g., *Manway Construction Company, Inc. v. Housing Authority of the City of Hartford*, 711 F.2d 501 (2nd Cir. 1983)—ancillary jurisdiction did not exist over a dispute which arose between a party to a federal litigation and a bank concerning the obligation to pay interest on a certificate of deposit referred to in the judgment entered in a federal action to which the bank was not a party. The Court declared that "(e)ven at the farthest reaches of ancillarly jurisdiction, we have not allowed district courts to consider claims so distinct as here from the underlying basis for federal jurisdiction." (711 F.2d at 505).

The writ review cases cited on pp. 17-18 have nothing to do with the issues presented and the government's reliance thereon is similarly misplaced.

Even if the Article 78 proceeding was a separate proceeding representing an impermissible challenge to a federal court order, which it clearly is not, jurisdiction would not exist under 28 U.S.C. § 1443, the civil rights removal statute, as claimed by the United States on page 16. The Raceway's Article 78 proceeding had none of the attributes of a civil rights action necessary to invoke the statute. Another required showing which could not

be made even if the City could be considered a defendant for removal purposes is that the state courts would deny the City its civil rights. See *Greenwood v. Peacock*, 384 U.S. 808, 827 (1966).

The Yonkers NAACP admits on page 9 of its brief that federal subject matter jurisdiction cannot be based upon "the Raceway's claim that the instant taking violates certain state statutory rights . . ." They argue that state proceedings which "stand as an impediment to the fulfillment of civil rights" must be removed thereby seeking to rewrite the civil rights removal statute. In support of this statement irrelevant cases are cited involving direct legal challenges to federal court orders in a state court and legislature. This is simply not such a case.

It is difficult to accept the argument of the City of Yonkers that the decision of the Court of Appeals should not be reviewed since such jurisdictional errors rarely occur. The claim of the City on page 13 that the issue of "exceptional circumstances" under *Pennsylvania Bureau of Corrections* presents an unreviewable factual question is incorrect. Whether the All Writs Act can supply a basis for subject matter jurisdiction is a legal issue which has been repeatedly rejected by decisions of other circuits listed on page 13 of the Raceway's Petition. Furthermore, contrary to the statement on page 13, the state court has *not* granted the City's condemnation petition. As indicated on page 12 of the brief of the United States, the District Court has ordered that the title to the various private sites be deemed transferred so that the construction phase could commence. Title to the Raceway's property has not actually vested in the City, nor does this argument, even if factually correct, warrant the denial of the Raceway's petition.

CONCLUSION

This Court should review this case because of the significant increase of the jurisdiction of the District Courts, contrary to the expressed will of Congress, resulting from the decision of the Court of Appeals; the conflict between decisions of this Court and the subject determination concerning the removal jurisdiction of the District Courts and the scope of the All Writs Act and the conflict between applicable New York precedent and the determination of the Court of Appeals on important issues of state law.

Respectfully submitted,

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